



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

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ENVIR. APPEALS BOARD

OFFICE OF
GENERAL COUNSEL

September 24, 2007

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
1341 G Street NW, Suite 600
Washington, DC 20005

Re: Christian County Generation, LLC, PSD Appeal No. 07-01

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board in the above-referenced matter is an original and five copies of the Brief of EPA Office of Air and Radiation. Copies of this document have been served on all parties in accordance with the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristi M. Smith".

Kristi M. Smith
U.S. EPA, Air and Radiation Law Office
(202) 564-3068 (office)
(202) 564-5603 (fax)

Enclosures

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. ENVIR. APPEALS BOARD

In re:

Christian County Generation, LLC

PSD Appeal No. 07-01

BRIEF OF THE EPA OFFICE OF AIR AND RADIATION

The Office of Air and Radiation (OAR) of the Environmental Protection Agency (EPA) submits this brief in accordance with the Environmental Appeals Board's (EAB or Board) July 20, 2007 Order in the above-captioned matter. OAR's position is that the Illinois Environmental Protection Agency's (IEPA) treatment of carbon dioxide (CO₂) emissions from the Christian County Generation power plant in issuing the Prevention of Significant Deterioration (PSD) permit was consistent with the Clean Air Act (CAA or Act), corresponding implementing regulations, and EPA policy.

I. Introduction and Background

This case involves an appeal of a PSD permit issued by the IEPA to Christian County Generation, LLC (Christian County) to construct a coal-fired integrated gasification combined cycle (IGCC) power plant and associated emission units, known as the Taylorville Energy Center, in Christian County, Illinois. In its July 20, 2007 Order, the Board requested that OAR and the Office of General Counsel file a brief addressing issues raised by Petitioner's arguments regarding consideration of CO₂ emissions in the

Best Available Control Technology (BACT) analysis for the proposed facility. Specifically, the Board asked OAR to address the Petitioner's arguments that the Christian County PSD permit should be remanded because: (1) the permit lacks a CO₂ emissions limit based on BACT, and (2) IEPA failed to consider the collateral environmental impacts of CO₂ in its BACT analysis.

As a preliminary matter, OAR agrees with IEPA and the permittee that Petitioner has not preserved these issues for review for the reasons set forth in the briefs already submitted by these parties. Accordingly, consistent with the Board's precedent cited in the arguments of IEPA (Response to Pet. at 11-15, 33-36) and Christian County (Mot. to participate at 4-9, 16-19), review of this case should be denied without reaching the merits of the issues raised by Petitioner. Nonetheless, per the EAB's Order, OAR will address Petitioner's arguments below in order to assist the Board in the event that it reaches the merits of the case.

In undertaking any substantive analysis of Petitioner's arguments, the Board should also be aware that EPA Region 8 recently addressed these same issues in the course of issuing a PSD permit for the Deseret Bonanza electric generating unit, to be constructed in eastern Utah. In that action, consistent with the arguments below, the Region concluded that it lacked the legal authority to establish emissions limitations for CO₂ and that the record did not show that consideration of the global impacts of CO₂ and other greenhouse gas (GHG) emissions would have changed the outcome of the collateral environmental impacts component of the BACT analysis for regulated pollutants. *See* Response to Public Comments on Draft Air Pollution Control Prevention of Significant Deterioration (PSD) Permit to Construct, Permit No. PSD-OU-0002-04.00 (August 30,

2007; Deseret Bonanza Response to Comments), at 5-6, *available at* <http://www.epa.gov/region8/air/permitting/deseret.html>.

II. IEPA Lacks the Authority to Include a CO₂ Emissions Limit in the Christian County PSD Permit.

The absence of a CO₂ emissions limitation in the Christian County PSD permit does not establish grounds for remand. The EPA Administrator long ago established that the Agency, and delegated permitting authorities such as IEPA, “lack[] the authority to impose [PSD permit] limitations or other restrictions directly on the emission of unregulated pollutants.” *North County Resource Recovery Assoc.*, 2 E.A.D. 229, 230 (Adm’r 1986). In fact, the Board has already applied this long standing principle and determined that CO₂ emissions are not regulated pollutants for PSD permitting purposes. *Inter-power of New York*, 5 E.A.D. 130, 151 (EAB 1994) (finding EPA was not required to examine technologies aimed at controlling CO₂ because it was an unregulated pollutant); *see also Kawaihae Cogeneration Project*, 7 E.A.D. 107, 132 (EAB 1997) (upholding a PSD permit in which the permitting authority found that CO₂ was not “a regulated air pollutant for permitting purposes”). While the Supreme Court decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), held that CO₂ and other GHGs are “air pollutants” under the CAA, that decision did not make CO₂ a regulated NSR pollutant and, thus, does not alter the requirements of the current PSD permitting program.

A. PSD Permitting Requirements Apply Only to Those Air Pollutants Actually Regulated under the CAA.

The Clean Air Act requires PSD permits to contain emissions limitations for “each pollutant subject to regulation” under the Act. CAA §§ 165(a)(4), 169(3). In carrying out the PSD permitting program, EPA promulgated a regulation implementing